In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 556

SAKRETE OF NORTHERN CALIFORNIA, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 14–27) is reported at 332 F. 2d 902. The Board's Decisions and Orders (Pet. 29–42) are reported at 137 NLRB 1220 and 140 NLRB 765.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1964 (Pet. 14–27), and a petition for rehearing was denied on July 9, 1964 (Pet. 28). The petition for a writ of certiorari was filed on October 5, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

748-022—64

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the operating relationships between petitioner and another company manufacturing the same product and owned by the same persons who own petitioner are sufficiently close to make the two companies a single employer for purposes of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et. seq.*) are set forth at pages 3–5 of the petition.

STATEMENT

The Board found that, although petitioner's operations alone were not sufficient to subject petitioner to the Board's jurisdiction, there was sufficient common ownership, control, and other connections between petitioner and Sakrete, Inc., an Ohio corporation, to make them a single employer for purposes of the Act, and to give the Board jurisdiction over the combined enterprise. The Board further found that petitioner violated Sections 8(a)(1), (2), (3) and (5) of the Act by coercively interrogating its employees, promising them benefits to abandon the Union, and threatening them with reprisals if they continued to support the Union; by dominating, assisting and supporting an independent organization of its employees; by discriminatorily laying off, and later discharging, its employees; and by refusing to recognize and bargain with the Union as the repre-

sentative of its employees. (Pet. 29–34, 35–42.) Petitioner does not here attack the Board's unfair labor practice findings; it challenges solely the Board's determination that petitioner and Sakrete of Ohio constitute a single employer.

The facts underlying the single employer finding are accurately set forth in the petition (Pet. 6–8), which adopts the statement of facts set forth in the Board's brief to the court below. The following additional facts are also relevant: Although daily decisions concerning expenditures, hiring, discharge, or discipline of employees are made by Philip Schneider, petitioner's executive secretary, Arthur Avril, the president and owner (together with his wife) of both petitioner and Sakrete of Ohio, has and exercises the final authority in all matters affecting petitioner (Pet. 33; Tr. 19, 21–22).[1] Thus, following the Union's demand for recognition as the representative of petitioner's employees, Avril himself negotiated by telephone, from his office in Cincinnati, with the employees' spokesman concerning improvements in the terms and conditions of employment at petitioner's plant in California (Pet. 33; Tr. 16–17, 21–22, 73, 119, 136, 139, 219–222, 268–273). Moreover, when Avril finally reached agreement with the employees, he told their spokesman to call him in Cincinnati if there were any problems in the future (R. 73; Tr. 224–225).

[1] References to the pleadings reproduced for the court below and filed with the petition as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript of the hearing reproduced pursuant to Rules 10 and 17 of the Ninth Circuit as "Volume II, Transcript of Record," are designated "Tr."

The court of appeals affirmed the Board's finding that petitioner and Sakrete of Ohio constituted a single employer (Pet. 17–23), and enforced the Board's order in full (Pet. 27).

ARGUMENT

Petitioner does not contest the settled principle that two separate corporations may be treated as a single employer for purposes of the Act—so that the Board has jurisdiction over the entire entity—if there are sufficient common ties between the two companies. Its sole contention is that the ties here were insufficient (Pet. 11). That is essentially an evidentiary question, which does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491.

In any event, the record amply supports the Board's finding, approved by the court below, that petitioner and Sakrete of Ohio are a single employer. The stock of both companies is owned by Mr. and Mrs. Avril. Both companies sell the same products and use special patented equipment; indeed, petitioner uses this special equipment under a license from Sakrete of Ohio, must conform to quality standards set by the latter and cannot sell any products not approved by it. The officers and directors of both companies are substantially identical. And, most significantly, while Executive Secretary Philip Schneider is ostensibly in charge of petitioner's operations, the record shows

that Avril himself not only establishes policy for the management and operation of petitioner, but also exercises personal control over petitioner's labor relations, and utilized this power during the Union's organizing campaign. (Pet. 18–20, p. 3, *supra.*) Thus, the Board's finding that petitioner and Sakrete of Ohio are a single employer does not merely rest, as petitioner asserts (Pet. 11), on the fact that the same person owns and exercises some control over two unrelated companies. As the court below properly concluded (Pet. 20), the facts here show that "the operations of petitioner and Sakrete [of Ohio] are closely integrated, that their labor relations policies are almost identical and are centrally controlled, that the management of both resides virtually in one man, and that both are commonly owned and financially controlled."

There is no conflict between the decision below and *National Labor Relations Board* v. *Shawnee Milling Co.,* 184 F. 2d 57 (C.A. 10) (Pet. 9–10), in which the Tenth Circuit held that the Board had improperly treated as a single employer two plants which were commonly owned and were subject to some degree of common control. The different results in the two cases turn upon their different facts. The plant over which the Board asserted jurisdiction in *Shawnee* manufactured a different product (flour) than the other plant (animal feed) and, as the court there

pointed out (184 F. 2d at 59), the latter plant was operated "as a separate unit," and its manager possessed and exercised "complete charge of its activities and operations, subject only to over-all supervision as to policies, including labor policies." In short, the two plants involved in *Shawnee* were not subject to common detailed operational control and management. In the instant case, on the other hand, the two plants make the same products; the standards for petitioner's production are set by Sakrete of Ohio; and Avril, the president of both companies, exercises control over, not only the general, but the day-to-day, policies of petitioner, including the formulation and execution of its labor relations policies (Pet. 19–20).[2]

[2] The Tenth Circuit's decision in *Shawnee* rests largely upon an earlier decision of the Ninth Circuit in *National Labor Relations Board* v. *Santa Cruz Fruit Packing Co.*, 91 F. 2d 790 (184 F. 2d at 59). The court below distinguished *Santa Cruz*, but intimated its doubts as to the correctness of that decision, which had been made early in the administration of the Act and long before the Board had developed the "single employer" concept (Pet. 22–23).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.[3]

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
WARREN M. DAVISON,
Attorney,
National Labor Relations Board.

OCTOBER 1964.

---

[3] *Radio and Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.*, No. 61, this Term, certiorari granted, October 12, 1964, presents a related question as to the Board's treatment of several affiliated corporations as a single employer—although in a different context. The question in that case is whether the Supreme Court of Alabama improperly assumed jurisdiction over a labor dispute between a union and a radio station, because the dispute was subject to the jurisdiction of the National Labor Relations Board. The Board's position on that issue, set forth in its memorandum *amicus curiae*, is that, although it would not take jurisdiction over the single station directly involved in the dispute, it would treat that station and three others operated by affiliated corporations as a single employer. Since the factual basis for the Board's assumption of jurisdiction is even stronger in the present case than in *Mobile*, we see no occasion for deferring disposition of the present petition until the latter case has been decided.

U.S. GOVERNMENT PRINTING OFFICE: 1964